Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

To: The Commission

COMMENTS ON AND OPPOSITION TO PETITIONS FOR RECONSIDERATION AND CLARIFICATION

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October 31, 1996

SUMMARY

Competition has not proved to be a popular concept with local exchange carrier ("LEC") incumbents. In their petitions for reconsideration, and their actions taken to undermine the *Local Competition Order*, these parties seek to limit the ability of CMRS and other new entrants to compete. The petitions seek modifications of the *Local Competition Order* that would forestall erosion of incumbent LEC monopoly power. The Commission must reject as patently self-serving these attempts to dilute the power of pro-competitive rules. At the same time the Commission should clarify aspects of the *Local Competition Order* as they apply to CMRS providers, including the scope of the FCC's jurisdiction over CMRS providers under Section 332.

Incumbent LECs have objected to the Commission's establishment of MTA-wide "local" treatment of interconnected CMRS traffic. This objection overlooks that typical existing cellular agreements quite properly have not limited cellular carriers to landline local calling scopes. LEC attempts to shrink the CMRS local calling area to a very limited geographic area that bears no relationship to the FCC's interstate CMRS licensing scheme would only produce an unjustified windfall for the LECs and harm the ability of CMRS providers to compete. Under the LECs' preferred outcome, CMRS providers would be forced to pay one-way, non-cost based access charges for traffic the CMRS network treats as local, while at the same time incumbent LECs would evade paying CMRS providers the statutorily-required reciprocal compensation for transport and termination for a large portion of the traffic exchanged. The Commission must clarify that CMRS providers are not subject to new access charges as a result of the 1996 Act. The Commission must stand firm, recognizing its special authority over CMRS providers via federal licensing and Section 332, and retain its CMRS calling scope rules as modified to apply

to cellular providers. Comcast Cellular and Vanguard Cellular seek clarification of the Commission's rules to allow cellular carriers with multiple market systems to define their local calling areas based on their adjacent "local" MSAs and RSAs.

Backdoor attempts to hamstring CMRS as a competitor should also be addressed on reconsideration. The Commission should reject state commission attempts to reclassify CMRS providers as LECs. There is simply no basis for such a reclassification. The FCC should clearly and unequivocally state that CMRS providers are subject to the FCC's exclusive jurisdiction pursuant to Section 332 of the Act for purposes of determining local calling scope and other rights and benefits to be afforded as a result of being a telecommunications carrier. Likewise, the utility companies' gambit to limit CMRS providers' access to utility facilities via the pole attachment provisions ignores the plain language of the statute. CMRS providers are "telecommunications carriers" and are entitled to seek access on the same basis as other carriers. The Commission should also clarify its rules to prevent LEC game playing in compensation for CMRS switching and transport. Without FCC clarification, it is plain LECs intend to treat CMRS switches as end office rather than tandem switches, thereby ignoring the network functionality inherent in cellular MTSOs. Such attempts to limit applicable reciprocal compensation obligations must be rejected.

The petitions filed in this rulemaking, as well as their court filings in the Eighth Circuit and the Supreme Court, demonstrate how the incumbent LECs seek to derail the *Local Competition Order* and forestall competition. The Commission should maintain its policy of promoting competition by upholding effective national rules, while clarifying them when necessary to ensure that all parties have an opportunity to compete.

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Comcast Cellular Communications, Inc. ("Comcast Cellular") and Vanguard Cellular Systems, Inc. ("Vanguard Cellular") (or collectively, the "Joint Parties"), by their attorneys, hereby submit their comments on and opposition to several petitions for reconsideration and clarification filed on the Commission's *Local Competition Order*.[1/] The *Local Competition Order* set the ground rules for the momentous process of opening local exchange and exchange access markets to facilities-based competition, and the Commission's decision to establish national rules was completely justified and appropriate. For the reasons discussed below, Comcast Cellular and Vanguard Cellular urge the Commission to rebuff attempts to weaken the *Local Competition Order*, and ask the Commission to reconsider or clarify the

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1/ *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185 (released August 8, 1996) ("*Local Competition Order*").

rules specified herein with respect to their impact on commercial mobile radio service ("CMRS") providers.

I. INTRODUCTION

The Commission's *Local Competition Order* establishes the rules of the road for competition in the local exchange market. As befits an industry where technology is transforming distance into an almost irrelevant concept, the Commission's rules are appropriately national in scope, and they are intended to ensure that all citizens in this country have access to advanced telecommunications networks provided by all kinds of carriers. On reconsideration, the Commission must uphold its national rules, and clarify them where necessary to ensure that all parties have an opportunity to compete for customers in a fair and equitable manner. To that end, the Commission must reject the attempts of incumbent local exchange carriers ("LECs") and others to restrict opportunities for competition or make competitive challenges far more expensive, inefficient and uncertain. The FCC's rules must effectively shut down the incumbent LECs' toll booths.

As the LECs have demonstrated by their efforts to have the *Local Competition Order* rules overturned in court and by filing petitions for reconsideration that reargue nearly every aspect of the *Local Competition Order*, these rules represent the first real threat to incumbent LEC monopoly power. The Commission must not bow to the pressure of LECs to reduce the effectiveness of those rules. Further, the clarifications identified by the Joint Parties in their petition are even more critical in light of experience in ongoing incumbent LEC interconnection negotiations and arbitrations and the Eighth Circuit stay. In particular,

the Commission must remedy the persistent problems associated with anticompetitive LEC interconnection arrangements with existing cellular providers. Because of its independent jurisdiction over CMRS providers via Section 332, the Commission must exercise its responsibility to implement the 1996 Act[2/] in a manner that promotes CMRS competition and the Congressional vision of national wireless networks.

II. CMRS PROVIDERS MUST NOT BE DISADVANTAGED IN THEIR ABILITY TO INTERCONNECT WITH THE LEC NETWORK.

A. Local Calling Areas Properly Should Reflect the Networks and Type of Service Offered.

In the *Local Competition Order* the Commission properly recognized that the definition of "local" traffic is important because it determines which traffic must be accorded reciprocal treatment pursuant to Section 251(b)(5).[3/] It is uncontested that the Commission has the exclusive authority to license CMRS as well as exclusive jurisdiction to determine a CMRS provider's service territory and calling scope.[4/] Exercising this jurisdiction, the FCC in the *Local Competition Order* promulgated a rule requiring LECs to apply reciprocal

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2/ Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 ("1996 Act").

3/ 47 U.S.C. § 251(b)(5); *Local Competition Order* at ¶¶ 1034-5.

4/ In the case of personal communications services ("PCS") providers, the FCC has licensed spectrum using MTAs, the vast majority of which are interstate in scope. For cellular, areas originally licensed on an MSA/RSA basis have concentrated into regional interstate networks of similar size and scope to the MTAs, although they are not limited by MTA boundaries. *See* Joint Petition for Reconsideration and Clarification of Comcast Cellular Communications, Inc. and Vanguard Cellular Systems, Inc. at 10.

termination and transport to CMRS-interconnected traffic that originates and terminates within the same MTA.[5/]

The incumbent LEC Coalition takes issue with the FCC's determination that CMRS-licensed service areas should reflect the scope of "local" calling. The LEC Coalition claims that such treatment creates "a basis for significant competitive discrimination."[6/] This complaint merely masks the LECs' general discomfort for competition by labeling it as discriminatory. The Commission must strongly reaffirm that incumbent LECs cannot restrict CMRS calling scopes to reflect historical landline customer toll and non-toll calling areas that have nothing whatsoever to do with CMRS licensed service areas.

Adoption of CMRS-based local calling areas, as clarified in the petition of the Joint Parties,[7/] is vital to the growth of the CMRS industry. Failure by the incumbent LEC to treat as local the same traffic that the CMRS provider treats as local will result in burdening CMRS customers by the improper assessment of access charges that, it is universally agreed, do not reflect the incumbent LECs' additional cost of reciprocal termination. The LECs may claim that they will offer to negotiate "low" transport and termination rates for CMRS providers within their landline "local" calling area, but low reciprocal rates for a geographically circumscribed area are of little benefit if the LECs insist on attempting to

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5/ *See* 47 C.F.R. § 51.701.

6/ *See* Petition of the Local Exchange Carrier Coalition for Reconsideration and Clarification at 16 ("LEC Coalition").

7/ *See* Joint Petition for Reconsideration and Clarification of Comcast Cellular Communications, Inc. and Vanguard Cellular Systems, Inc. at 10. ("The FCC should allow cellular carriers with multiple market systems to define their local calling areas based on adjacent MSAs and RSAs within their contiguous footprint of operation, if the cellular system operator treats these areas as local for the purpose of network design.")

collect above-cost, one-way access charges to be applied to the bulk of the traffic exchanged within a CMRS provider's licensed service areas. Shrinking the CMRS local calling area as the incumbent LECs propose will only produce a dual windfall for the LECs: the CMRS providers will be forced to pay access charges for local calls, while the LECs will evade paying reciprocal compensation for transport and termination for the majority of the traffic exchanged for termination.[8/] Such a lopsided arrangement smacks of the very "competitive discrimination" purportedly feared by the incumbent LECs.

If the incumbent LECs had strong objections to broad CMRS calling areas it is surprising that none of them voiced concerns either in their comments or replies in the CMRS interconnection Notice or during the *Local Competition Order* rulemaking or for that matter before the Eighth Circuit in their stay motions.[9/] The CMRS Notice squarely raised the issue. In fact, one incumbent LEC, SBC Corporation, filed comments that attached affidavits from their expert that supported larger CMRS calling scopes.[10/]

8/ Indeed, to the extent the FCC determines that any form of access charges should apply, the FCC must specify that they are to be reciprocal, reflecting that the CMRS network provides wide area transport and termination for the LEC.

9/ *See, e.g.*, Motion for Stay Pending Judicial Review and for Expedited Judicial Review, *Iowa Utilities Board v. FCC*, Case No. 96-3321, filed by GTE Service Corporation (8th Cir., Sept. 16, 1996); Motion for Stay Pending Judicial Review, *Iowa Utilities Board v. FCC*, Case No. 96-3321, filed by U S West, Inc. (8th Cir., Sept. 16, 1996); Motion for Stay and Expedited Review, *Iowa Utilities Board v. FCC*, Case No. 96-3321, filed by The Southern New England Telephone Company (8th Cir., Sept. 9, 1996).

10/ *See Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service* Providers, CC Docket No. 95-185, 94-54, 11 FCC Rcd 5020 (released January 11, 1996) Comments of SBC Corporation Appendix A, Affidavit of Professor Jerry A. Hausman. Attached as Exhibit A.

Commission authority to determine the relevant CMRS calling scope is undisputed. In addition to the responsibility given to the Commission to implement the 1996 Act, the Commission already had jurisdiction over virtually all aspects of CMRS regulation by virtue of its exclusive authority to license CMRS providers and, via the changes to Section 332, from the Budget Act of 1993. Section 332 grants the FCC exclusive jurisdiction to regulate CMRS providers[11/] and over common carrier interconnection with CMRS providers.[12/] The 1993 amendments to Section 332 provide an independent basis for Commission determination of all aspects of CMRS regulation put forth in the *Local Competition Order*, including the Commission's determination that CMRS "local" calling scopes could not rationally be circumscribed to traditional landline service areas. The states simply have no authority in this area.

Competition demands that local calling areas properly reflect the nature of the network that is interconnecting and type of service offered. A CMRS local calling area must be respected by incumbent LECs and accorded reciprocal transport and termination. The FCC must reject transparent LEC attempts to load supra-competitive costs on their would-be CMRS competitors.[13/]

11/ *See* 47 U.S.C. § 332(c)(1)(A).

12/ *See* 47 U.S.C. § 332(c)(1)(C). While the Commission's *Local Competition Order* declined to specify the scope of the Commission's "alternative" jurisdiction under Section 332 over CMRS providers, in light of the Eighth Circuit's stay of the reciprocal transport and termination rules, the Joint Parties respectfully submit that the Commission now should address the scope of its Section 332 jurisdiction.

13/ Arguments that establishing calling areas that cover more than one state will "dramatically shift revenues and costs from the interstate to the intrastate jurisdiction" are red herrings. *See* Petition of the LEC Coalition for Reconsideration and Clarification at 16-17.

(continued...)

B. State Commission Requests to Reclassify CMRS Providers as LECs Should Be Rejected.

As the Commission properly recognized, CMRS providers are nowhere near to achieving the marketplace status that would justify treating them as LECs.[14/] Some state commissions, however, continue to ask the Commission to allow the states to regulate CMRS providers as LECs whenever CMRS is used as an "alternative" loop to provide basic local exchange service.[15/] These requests to treat admittedly different types of providers "the same" ignore the fundamental differences between CMRS and wireline providers that was reflected both in the 1993 Budget Act and the 1996 Act.

In 1993, Congress made a determination that mobile services are inherently interstate and accordingly, that state regulation of CMRS (and CMRS interconnection) should be drastically limited.[16/] Congress further distinguished between LECs and other types of

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13/ (...continued)
The Commission has the authority to determine what charges are interstate and what charges are not, and has properly determined that CMRS "local" calls that are exchanged with LECs should not be subject to the interstate access charge regime.

14/ *See, e.g., Local Competition Order* at ¶ 1004. ("We are not persuaded by those arguing that CMRS providers should be treated as LECs, and decline at this time to treat CMRS providers as LECs. Section 3(26) of the Act, quoted above, makes clear that CMRS providers should not be classified as LECs until the Commission makes a finding that such treatment is warranted. We disagree with COMAV and the National Wireless Resellers Association that CMRS providers are *de facto* LECs (and even incumbent LECs if they are affiliated with a LEC) simply because they provide telephone exchange and exchange access services. Congress recognized that some CMRS providers offer telephone exchange and exchange access services, and concluded that their provision of such services, by itself, did not require CMRS providers to be classified as LECs.")

15/ *See* Petition for Reconsideration by the Public Utilities Commission of the State of Colorado at 7-8.

16/ *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, 107 Stat. 312, (continued...)

telecommunications carriers three years later when it developed the structure for the 1996 Act.[17/] Nothing in the 1996 Act indicates that Congress intended to change the criteria established in 1993 for determining when states are legally permitted to regulate CMRS providers as LECs.[18/] Accordingly, the FCC should reaffirm its conclusion not to classify CMRS providers as LECs at this time.

C. Access to Rights of Way Cannot Be Limited By Type of Service Provider.

In the 1996 Act, Congress expanded the pole attachment provisions of the Communications Act to all telecommunications carriers. It's intent was obvious: "a utility

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16/ (...continued)
392 ("1993 Budget Act"). Under the provisions of the 1993 Budget Act that were entirely undisturbed by the 1996 Act, states can reassert jurisdiction over CMRS rates and interconnection only when they can demonstrate to the FCC's satisfaction that CMRS is functioning as a replacement to a "substantial portion of the wireline telephone exchange service within any state."

17/ *See* Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, Title I, Section 101; 47 U.S.C. § 251. Section 251 establishes different interconnection obligations for three different types of carriers: telecommunications carriers, local exchange carriers, and incumbent local exchange carriers.

18/ Indeed, Section 251(i) provides that "nothing in [Section 251] shall be construed to limit or otherwise affect the Commission's authority under [S]ection 201." 47 U.S.C. § 251(i). The legislative history of this provision confirms that "[n]ew subsection 251(i) makes clear the conferees' intent that the provisions of new section 251 are in addition to, and in no way limit or affect, the Commission's existing authority . . . . *See* Telecommunications Act of 1996, *Conference Report* to accompany S.652 at 123 (reprinted in 142 Cong. Rec. H1107 (daily ed. January 31, 1996)). Under Section 201(b) the Commission has the jurisdiction to review all "charges, practices, classifications, and regulations for and in connection with" CMRS because of Section 332(c)(3)'s preemption of power in this area. Section 332(c)(3) states in part that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service."

shall provide . . . *any telecommunications carrier* with nondiscriminatory access to any pole, duct, conduit or right-of-way owned or controlled by it."[19/]

Despite the plain language of the statute, several utility petitioners insist that CMRS providers should be denied the same access to poles as other telecommunications providers. No basis exists for the Commission to narrow the scope of the pole attachment provisions so as to exclude equipment used by wireless carriers.[20/]

Utility arguments that wireless equipment "has not been considered a 'pole attachment'"[21/] are irrelevant; prior to the 1996 Act the pole attachment provisions applied only to cable television systems.[22/] By expanding the provisions to all telecommunications carriers, Congress refused to favor one type of telecommunications technology over another, mirroring the pro-competitive position the Commission implemented in the *Local Competition Order*. The Commission properly adopted pole attachment rules that require utilities to provide equal access to pole facilities, but that at the same time recognize the need of utilities

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19/ 47 U.S.C. § 224(f)(1) (emphasis added). Congress was fully aware that CMRS providers would be classified as telecommunications carriers under the 1996 Act, yet Congress in no way limited the applicability of the pole attachment provisions to non-traditional telecommunications carriers.

20/ *See* Florida Power & Light Company's Petition for Reconsideration and/or Clarification of the First Report and Order at 24.

21/ *Id.* at 25.

22/ Similarly, arguments that the definition of "utility" restricts the pole attachment provision to wire communications are also irrelevant. *Id.* at 25-26. It is the *utility* that must provide access under the pole attachment provision to *any telecommunications carrier*, not the other way around. Thus, if the definition of utility argument were valid, it would merely relieve the obligation of CMRS providers to provide other carriers with access to facilities that the CMRS providers may own. It in no way, however, supports an argument that wireless carriers do not have the same access to utility facilities as do wireline carriers.

to manage their own resources. No rational legal or factual basis exists for the Commission to narrow the application of pole access rules when these rules only require "reasonable" efforts to accommodate attachment requests.[23/]

Restricting access based on type of equipment proposed to be attached would be contrary to the public interest. No public benefit would be realized by keeping wireless equipment off of utility property, and a public harm would result because it would inhibit the ability of CMRS operators to deploy their technology. As some utility parties freely admit, there is other equipment on poles today beside single coaxial cable,[24/] and no valid safety or other argument against allowing wireless equipment on poles and other utility facilities has been raised.[25/] The Commission should not modify its rules to restrict the pole attachment provisions.

23/ *See, e.g.,* Request for Reconsideration and Rehearing of First Report and Order by Consolidated Edison Company of New York, Inc. at 3-4 (disputing Commission's authority to require utilities to take "reasonable" steps to accommodate attachment requests).

24/ *See* Petition for Reconsideration and Clarification of Duquesne Light Company at 17-18 (discussing the increased burden during inclement weather on a pole due to a fiber-wrapped coaxial cable when compared with a single coaxial cable).

25/ Indeed, if utility poles, ducts, conduits and rights-of-way are "unsuited for the placement of wireless equipment" as is claimed, CMRS providers will not seek to place their wireless equipment there. *See* Florida Power & Light Company's Petition for Reconsideration and/or Clarification of the First Report and Order at 25. Congress has determined, however, that it is the telecommunications carrier, and not the incumbent utility, that initially makes the judgment whether a location is "suited" for placement of its equipment. Wireless companies and utilities have already entered into agreements whereby wireless companies are obtaining access to utility facilities, such as in the Philadelphia region where AT&T Wireless and PECO have agreed that AT&T will have access to PECO facilities for purposes of locating wireless equipment. The terms and conditions of this wide-scale agreement, which the Pennsylvania Public Utilities Commission has determined must also be available on a nondiscriminatory basis to other wireless carriers, are evidence that utility objections to wireless equipment have no basis in fact and should be dismissed.

III. RULES FOR INTERCONNECTION AND RECIPROCAL COMPENSATION AND CLASSIFICATIONS OF UNBUNDLED ELEMENTS MUST PROMOTE COMPETITION.

A. Reciprocal Compensation Must Not Be Based on Narrow-Minded Classifications of "Network Similarity."

The principles of symmetrical compensation and nondiscrimination embodied in the 1996 Act require that incumbent LECs recognize that other carriers' networks necessarily will differ from the rate-of-return gold plated, switch laden LEC network. CMRS networks, for example, typically have a single or several switches serving an expansive geographic area and these switches function both as tandems as to the interconnecting incumbent LEC and as end offices to the CMRS customer's wireless loop. Because in most cases the CMRS switch and associated network components provide both a tandem and transport function for the incumbent LEC, the LEC should pay the interconnector for the additional costs of transport and termination associated with this tandem network functionality.

Predictably, incumbent LECs are already making arguments seeking to avoid paying reciprocal, symmetrical tandem rates to CMRS providers while at the same time demanding that CMRS providers pay for duplicative switching over the LECs' inefficient network.[26/] The Commission's rules provide that states may establish transport and termination rates that vary according to whether traffic terminated to the LEC is routed through a LEC tandem switch or directly to the LEC end-office switch.[27/] While the Commission has adopted this conservative approach of permitting LECs to recover costs for each in-place switch, the rules

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26/ Petition of the LEC Coalition for Reconsideration and Clarification at 14-15.

27/ 47 C.F.R. § 51.711(b); *see also Local Competition Order* at ¶ 1090.

do not fully specify the appropriate cost treatment of the switching that CMRS providers perform for a landline call terminating on a CMRS network.

As demonstrated in the Petition of the Joint Parties, for example, the distributive properties of cellular networks by definition incorporate a tandem switching function.[28/] Cell sites are all connected to the cellular licensee's MTSO, where calls are typically handed off to the landline network. Landline LECs interconnect with cellular carriers at the MTSO and not at individual cell sites. The cellular MTSO serves both an end office function in connecting end user calls and a tandem function in covering the "transport" between and among the cells in the system.[29/] Accordingly, symmetrical compensation requires that, when a cellular licensee interconnects its MTSO with a LEC at the LEC's tandem switch, a tandem-to-tandem reciprocal cost arrangement should apply.[30/] Adoption of such a rule clarification will assist the negotiation process because incumbent LECs will not endlessly debate the treatment of a CMRS switch for purposes of reciprocal compensation.

28/ Joint Petition for Reconsideration and Clarification of Comcast Cellular Communications, Inc. and Vanguard Cellular Systems, Inc. at 14-15.

29/ MTSOs also often route calls directly to and from interexchange networks, which is another tandem function.

30/ Absent recognition that symmetrical compensation by functionality must apply, the LECs will receive a windfall from CMRS providers by collecting high access charges *and* evading reciprocal compensation payments. When combined with the LEC argument asking the Commission to restrict a CMRS provider's local calling area, the financial ramifications of adopting these LEC proposals are enormous and would significantly impair the CMRS industry's ability to compete for customers with incumbent LECs. The Commission must refuse to bow to incumbent LEC pressures and stand firm in its decision to recognize wide local callings areas for all CMRS providers by modifying its rules to accommodate cellular providers as discussed above while at the same time clarifying its rules to require reciprocal compensation by functionality, not equipment.

B. Directory Assistance and Operator Services Are Properly Treated as Unbundled Elements.

The incumbent LEC Coalition claims that directory assistance and operator services were improperly categorized as unbundled network elements and should instead only be made available under resale arrangements.[31/] The 1996 Act forecloses this argument because it specifies that directory assistance and operator services are segregable "network elements" to be unbundled.

The 1996 Act unequivocally defines directory assistance and operator services as "network elements." Specifically, Section 3(29), the statutory definition of network elements, provides that a network element:

> . . . includes *features, functions, and capabilities* that are provided by means of [] facilit[ies] or equipment [used in the provision of telecommunications service], including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

See 47 U.S.C. § 3(29). Directory assistance and operator services are "features, functions or capabilities" used in transmission and routing of telecommunications services and are, therefore, "network elements" within the meaning of the 1996 Act. Exempting these features from the network features that must be made available on an unbundled basis would be anti-competitive, as it would limit access to these unbundled elements only to non-facilities-based carriers. The LEC Coalition's attempt to take directory assistance and operator services out of the ambit of unbundled elements must be rejected as flatly inconsistent with the statute.

31/ Petition of the LEC Coalition for Reconsideration and Clarification at 27-29.

IV. BASED ON INDUSTRY EXPERIENCE WITH IMPLEMENTATION OF THE RULES THUS FAR, SOME RULE CLARIFICATIONS ARE NECESSARY.

A. CMRS Providers Must Not Be Thrown into the Access Charge Regime, Even Temporarily.

Access charge reform is an integral component of the Commission's "trilogy" of rule makings designed to pry open local exchange markets and make them accessible to competition, in many cases for the first time.[32/] There is universal agreement that the current access charge regime is far in excess of cost-based and in need of reform, and access reform will have to precede any significant local competition. Because LEC access charges impose costs on interexchange carriers far in excess of the costs allowable under the pricing standard in the 1996 Act for reciprocal transport and termination, it is vital that access charges not be imposed on CMRS providers as an unintended consequence of the implementation of the 1996 Act.

The Joint Parties support the clarification request of the Cellular Telecommunications Industry Association ("CTIA"). Specifically, the Commission should confirm that CMRS carriers are not obligated to pay access charges for traffic that currently is not subject to such charges even if CMRS calls originate in one MTA and terminate in another, as may be the case with cellular operators whose networks do not conform to MTA boundaries.[33/] If a CMRS provider paid access charges for landline termination of traffic before the *Local*

32/ *See, e.g.*, Speech of Reed Hundt, Chairman, Federal Communications Commission, to the Communications Committee, National Association of Regulatory Utility Commissioners, Tuesday, July 23, 1996, Los Angeles, California (discussing "The Competition Trilogy" of interconnection, universal service and access reform).

33/ Petition for Limited Clarification of the Cellular Telecommunications Industry Association at 3.

Competition Order was released, those inter-MTA calls could still be treated as "interexchange" calls.

To do other than as CTIA requests would produce another unjustified windfall for incumbent LECs. As Comcast Cellular and Vanguard Cellular described in their Joint Petition, cellular carriers in many cases have switches located outside of an MTA that primarily serve customers within an MTA.[34/] The many calls served by those cellular systems are not subject to access charges now, and should not become subject to access charges because of the Commission's decision to designate the MTA as the CMRS local calling area.[35/]

B. Competition Must Not Be Inhibited by Incumbent LEC Charges and Practices.

Since the August release of the *Local Competition Order*, the industry has been adjusting to the Commission's rules.[36/] Despite the Commission's best efforts to develop a reasonable and flexible set of rules that restrict the ability of incumbent LECs to disadvantage new entrants, events in the past few months have shown that the LECs are

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34/ *See* Joint Petition for Reconsideration and Clarification of Comcast Cellular Communications, Inc. and Vanguard Cellular Systems, Inc. at 9-10.

35/ As described above, the Joint Parties urge the Commission to clarify its decision on what is a CMRS provider's local calling area to include provisions for cellular providers to designate their local calling areas according to the cellular MSA/RSA licensing scheme.

36/ On October 15, 1996, the Eighth Circuit stayed the pricing provisions and the "most favored nation" sections of the *Local Competition Order,* thus putting all interconnection negotiations and arbitrations in an uncertain position. *See* Order Granting Stay Pending Judicial Review, *Iowa Utilities Board v. FCC*, Case No. 96-3321 and consolidated cases (8th Cir., Oct.15, 1996). Parties, including the Joint Parties, have petitioned the Eighth Circuit to vacate or modify the stay.

more interested in maintaining their historical monopoly protections and continuing to collect monopoly rents than they are in engaging in head-to-head competition. Like the toll booth that remains on the highway collecting tolls long after a road has been paid for, the LECs seek to continue to charge new entrants rates that have no relationship to actual LEC costs for interconnection, unbundled elements or reciprocal termination. There is every indication as well that incumbent LECs are taking enormous advantage of the Eighth Circuit's stay to renege on interconnection proposals made prior to the stay.

U S West, for example, as the attached letter shows,[37] offered a CMRS provider rates for tandem switching, transport, and end office switching that matched the FCC's default proxy prices before the Eighth Circuit stay was imposed. Immediately after the stay was entered, U S West withdrew them and instead has "offered" significantly higher access charge rates. Such overt abuse of the negotiation process must stop.

The Eighth Circuit stay, if not narrowed in response to pending motions, could remain in place for some time.[38] In the meantime, the Commission must do what it can to advance the goal of competition. In this regard, it should clarify that its default rates can be applied as a guideline for the states to follow while TELRIC studies are underway and that

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37/ *See* Exhibit B.

38/ For example, AirTouch Communications has asked the Eighth Circuit to modify the stay as it applies to CMRS providers, and the Joint Parties have asked the court to lift the stay as it applies to certain non-pricing portions of the *Local Competition Order* rules. *See* Emergency Motion to Modify Stay Expedited Action Requested, *Iowa Utilities Board v. FCC*, Case No. 96-3321, filed by AirTouch Communications, Inc. (8th Cir., Oct.18, 1996); Response to Emergency Motion to Modify Stay, *Iowa Utilities Board v. FCC*, Case No. 96-3321, filed by Comcast Corporation, Vanguard Cellular Systems, Inc. and Western Wireless Corporation (8th Cir., Oct. 25, 1996) (portions attached as Exhibit C).

true-ups to recover any ultimate differences are appropriate. Such a clarification would confirm for the states that they can use the FCC's pricing standards as guidelines even with the stay in place. The Commission should also establish on an interim basis guidelines to ensure that no party is harmed by the stay, such as imposing a true-up requirement should the FCC's pricing guidelines ultimately be upheld.[39/] LEC attempts to keep rates as high as possible for as long as possible and for as large a geographic area as possible are antithetical to the market-opening purposes behind the 1996 Act, and the Commission is well within its authority to promote competition while its rules are in challenge.

For example, interconnection negotiations could benefit from further FCC clarification of its application of statutory pricing principles. The Joint Parties support the petitions of the National Cable Television Association ("NCTA") and Teleport Communications Group Inc. ("TCG") to establish that the pricing standard for transport and termination is "additional cost" without any loading of common costs or overheads.[40/] As explained in the TCG and NCTA Petitions, the 1996 Act sets forth separate, distinct pricing standards for Section 252(d)(1) interconnection and network elements and Section 252(d)(2) transport and termination. The statutory language eliminates "reasonable profit" from the

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39/ Much of the contentiousness around the pricing issue would be dissipated if an interim rate with a true-up were adopted. If such an interim rate with a true-up were adopted, the LECs would have no incentive to prolong negotiations by adopting untenable positions. No harm would be visited upon the LECs by this approach because they would have the ability to demonstrate that their actual additional costs are in fact higher than those set forth in the interim rates. Comcast has previously provided the Commission with the legal analysis to sustain interim rates. *See* Exhibit D (attached).

40/ *See* Petition for Reconsideration filed by the National Cable Television Association, Inc. at 7-14; Petition for Reconsideration of Teleport Communications Group Inc. at 6-9.

pricing standard for transport and termination, and uses the term "additional cost" rather than "cost."[41/] Congress recognized that potential competitors have no alternative to the incumbent LEC networks for transport and termination, the last bottleneck facility, and therefore fittingly determined that the pricing standard for transport and termination should generally yield lower prices than the standard for unbundled elements that competitors could more readily duplicate.

Sound economic reasoning and pro-competitive policies underlie Congress' decision to establish different rate-setting methodologies for transport and termination, and the Commission must follow Congress' directive. NCTA points out that the availability of efficiently priced termination services is critical to competition, particularly if traffic is not balanced during the early stages because of the absence of full number portability. Even as competitors' market shares grow, they will still be dependent on the incumbent LECs for access to customers, and incumbent LECs will have every incentive to preserve their market power by overpricing termination and transport services. [42/] Under the pricing standards of the 1996 Act, incumbent LEC prices for transport and termination are limited to "additional costs."[43/] The Commission must amend its rules to conform with the statutory language.[44/]

41/ The statute further elaborates that this additional cost of reciprocal transport, if any, is minuscule by its allowance of bill and keep as an alternative to "additional" cost. *See* 47 U.S.C. § 252(d)(2)(B)(i).

42/ Petition for Reconsideration filed by the National Cable Television Association, Inc. at 11.

43/ The FCC recognized differing cost standards in its Reconsideration Order of the *Local Competition Order*, yet did not adjust it pricing standards for transport and termination. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and*

(continued...)

C. All Interested Parties Should be Permitted to Participate in Proceedings With Precidential Effect.

In state proceedings thus far, the incumbent LECs have attempted to limit access to TELRIC and other cost study data to only the parties directly involved in a particular arbitration. Many state commissions have agreed to limit interested party interventions in arbitrations, and thus interested parties have been prevented from reviewing and commenting upon data and studies that may well have precidential effect for other arbitrations and negotiated agreements.

The Joint Parties support MFS's petition request that the Commission preclude states from reviewing TELRIC studies in arbitration proceedings where all affected carriers have not been permitted to intervene. Further, the Commission should clarify that when a cost

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43/ (...continued)
Commercial Mobile Radio Service Providers, Order on Reconsideration, CC Docket Nos. 96-98, 95-185 (released September 27, 1996).

44/ AT&T provides evidence in its Petition that incumbents have attempted to circumvent the *Local Competition Order* by seeking to impose outrageous "non-recurring" charges on competitors. The Joint Parties support AT&T's request that the Commission: (1) clarify that "one-time" non-recurring costs for network construction and development costs should be recovered from each requesting carrier only to the extent of its relative use of the network among all carriers, including the incumbent; (2) clarify that incumbent LECs may charge only for the forward-looking costs of one-time activities and transactional non-recurring activities that an efficient provider would undertake to provide the requested facilities; (3) establish a rebuttable presumption to be used in TELRIC cost studies that the forward-looking cost of any non-recurring activity that can be accomplished largely through software or other electronic means is $5; and (4) limit service order and related transactional non-recurring charges to currently tariffed retail service order and related charges, less the avoided cost discount used to determine wholesale rates. *See* Petition of AT&T Corp. for Reconsideration and/or Clarification at 8-20. The Commission should not allow creative LEC maneuvers to outflank the pro-competitive forces unleashed by Congress in the 1996 Act and implemented by the Commission's rules.

study is used in an arbitration proceeding, all parties must have a reasonable opportunity to analyze and rebut the study.[45/]

Such rule clarifications would be pro-competitive because they would ensure that the pricing standards developed from the studies will be as accurate as possible, thus promoting Congress' intent that pricing standards match LEC forward-looking costs. Further, allowing all parties to comment on the studies will prevent LEC attempts to game the system by presenting different cost allocation and cost methodologies in different proceedings,[46/] and will preserve the resources of both state commissions and potential competitors by airing all cost study issues at one time. There may be only a single opportunity to review claimed LEC costs, if states seek to minimize a case-by-case arbitration process. If this is true, all interested parties should have a chance to participate. Relevant data must be open to scrutiny by all interested carriers, and the Commission should clarify its rules to provide for an open review process.

45/ Petition for Partial Reconsideration and Clarification of MFS Communications Company, Inc. at 19. *See also* Petition of AT&T Corp. for Reconsideration and/or Clarification at 24-25.

46/ *See* Petition of AT&T Corp. for Reconsideration and/or Clarification at 25.

V. CONCLUSION

For the reasons stated above, Comcast Cellular Communications, Inc. and Vanguard Cellular Systems, Inc., urge the Commission to rebuff attempts to weaken the *Local Competition Order*, and ask the Commission to reconsider or clarify the rules specified herein with respect to their impact on commercial mobile radio service ("CMRS") providers.

Respectfully submitted,

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October 31, 1996